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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DAVID and MAXINE MORRIS, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	PCHB No. 87-173 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER, the appeal of a Notice of State Regulation (posting) under the Water Code came on for hearing before the Board on November 9, 1987, in Yakima, Washington. Sitting as the Board were Wick Dufford, presiding, and Lawrence J. Faulk. Pursuant to the request of respondent Department, RCW 43.21B.230, the hearing was a formal one. Pat Adams of Adkins and Associates reported the proceedings.

Appellants were represented by David Morris, appearing pro se. Respondent was represented by Peter R. Anderson, Assistant Attorney General.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence, and contentions of the parties, the Board makes these

FINDINGS OF FACT

I.

The Department of Ecology (DOE) is a regulatory agency of the State of Washington with authority to administer and enforce the water resource laws of the state.

II.

Appellants Morris reside on an acreage in Yakima County on the south side of the Moxee Valley in what is known as the Black Rock area.

III.

The Morrises bought their property in 1973 and have been gradually developing it ever since. In 1975 and early 1976, a lawn, a garden and a small orchard were put in. In 1980 additional land was planted in alfalfa. In all, about seven and one-half acres were put into irrigated cultivation, with a well on the property as the water source.

IV.

In early 1985, the Morrises irrigation came to the attention of DOE. The agency advised, orally and in writing, that a permit is required to irrigate in excess of 1/2 acre of noncommercial lawn and garden.

The agency further informed the Morrises that their property is within the Black Rock study area where no new permits are being issued pending completion of a study of the adequacy of the ground water supply.

V.

In response to DOE, the Morrises ceased irrigating about half of the acreage being irrigated and applied for a permit to irrigate the rest. However, irrigation of more than 1/2 acre continued.

VI.

On June 23, 1987, upon a visit to the Morris' property, two DOE inspectors confirmed that more than 1/2 acre was being irrigated. At that time they posted the Morris' well and gave Mr. Morris a Notice of State regulation ordering him to cease withdrawal of groundwaters in excess of 5000 gallons per day or in excess of 1/2 acres.

VII.

The Morrises possess no permits or certificates authorizing their water use and have on file no timely claim to a right pre-dating the groundwater statute. Their only filing of record with DOE is the permit application they submitted in 1985. No action has been taken by the agency on the application.

VIII.

Since the late 1960's concerns have been voiced about declining groundwater levels in the Black Rock area of the Moxee Valley.

Efforts to assess the problem were unsuccessfully made in the 1970's. Finally in 1983 DOE commissioned a thorough study of the matter, encompassing a geographic area of about 100 square miles. The study area extends east and west along the valley and reaches north and south to the valley rims - Yakima Ridge and Rattlesnake Ridge respectively.

Adequate reliable information on the water bearing zones in the area has proven difficult to obtain and the study, as of today, has not been completed.

IX.

In recent years, declines of between 8 and 10 feet a year have been experienced in study area groundwater levels. The source of groundwater recharge is solely precipitation, and the region is an arid one, receiving in the neighborhood of 10 inches of precipitation a year.

At present, the total of water filings in the area is composed of one-third certificates, one-third permits and one-third applications. Assuming that not all the permitted appropriations have been perfected, there is cause for concern that the water mining situation will get worse.

X.

The Morris' property is somewhat isolated, separated from the valley proper by a knoll and elevated slightly above the valley

floor. Behind it the land rises steeply. The surrounding landscape is treeless, covered with sage and dry grasses. The Morrises worry about fire.

In 1978, a range fire swept over the ridge and came close to burning them out. Fire fighters were able to stop the blaze just short of the Morris place.

XI.

At present the Morrises are irrigating about one and a quarter acres, as follows: 0.65 acre - orchard; 0.10 acre - garden;; 0.50 acre - lawn. They would like to be able to continue irrigating this area in order to grow food for their private needs and to provide some greenery to serve as a fire break.

XII.

With their current state of knowledge, the DOE is unable at present to conclude that groundwater is available to the Morrises for withdrawal (in excess of 1/2 acre) without impairing existing rights.

In addition to the permits and certificates already issued for withdrawals in the study area, there are numerous applicants for permits with priority dates earlier than the Morrises. Some of these applicants are asking for large amounts of water. Were the agency obliged to rule on the Morris application today, it would have to deny it.

XIII.

Mr. Morris has alleged that he was told in 1976 by an employee of DOE that no permit was needed to carry on the irrigation he was conducting (then about two acres).

The employee in question is now dead. However, he was one of the most seasoned water resource workers in the State, with years of experience in administering the ground water statute. Moreover, his job was as a field investigator. He had no authority either to issue permits or to speak for the agency about such decisions.

XIV.

Any Conclusion of Law which is deemed a Finding of Fact is adopted as such.

From these Facts the Board comes to these

CONCLUSIONS OF LAW

I.

The Board has jurisdiction over these persons and these matters. Chapters 90.03, 90.44 and 43.21B RCW.

II.

The groundwater statute, chapter 90.44 RCW, supplements the Water Code of 1917 and incorporates its terms. RCW 90.44.020. Under these laws, the only way a right to use water may be acquired modernly is through the permit system administered by DOE. RCW 90.44.050, RCW 90.03.010.

The sole exception to the permit requirement relates to small groundwater withdrawals. The statute specifies the limits of the exception. It applies to withdrawals of less than 5000 gallons per day and the irrigation of less than 1/2 acre of noncommercial lawn and garden. RCW 90.44.050.

III.

The Morrises have violated the water laws by irrigating more than 1/2 acre without a permit from the state to do so. Under the circumstances the statutes expressly allow the posting of their withdrawal works and the issuance of an order commanding them to cease illegal withdrawals. RCW 90.03.070; RCW 43.27A.190.

Accordingly, we conclude that the Notice of Regulation in question here was properly issued.

IV.

Both the Board and the DOE recognize the hardship to the Morrises of having to reduce their irrigated acreage. However, it must be born in mind that they are not alone among applicants for use of the limited water resource in their area. Indeed, they are somewhere in the middle of the line of those asking for new appropriations. No reason is apparent for advancing them ahead of others. No justification is shown for allowing them to irrigate without a permit while others are waiting for permission to start.

V.

The Morrises position is that they relied on advice from a DOE employee in 1976 that they did not need a permit for what was then already irrigation exceeding the statutory exemption. Given the experience of the employee and the clarity and simplicity of the law on this point, we think it unlikely that such advice was given.

But, even if it was given, the Morrises were explicity disabused of any such notion by DOE in early 1985. Thereafter, any reliance on a 1976 conversation to justify irrigation in excess of the statutory exception was manifestly unreasonable.

Thus, we conclude that the Morrises have shown no valid defense for their 1987 irrigation in excess of 1/2 acre when the Notice of Regulation was made.

VI.

Any Finding of Fact which is deemed a Conclusion of Law is adopted as such.

From these Conclusions, the board enters this

ORDER

The Notice of State Regulation issued by DOE to David T. Morris on June 23, 1987, is affirmed.

DONE at Lacey, Washington this 23rd day of November, 1987.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Presiding

11/23/87

LAWRENCE J. FAULK, Member